Filed 11/23/20 In re Ethan G. CA2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

In re ETHAN G., a Person Coming Under Juvenile Court Law.	B298288
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. CARLEY C., Defendant and Appellant.	(Los Angeles County Super. Ct. No. 18LJJP00178)

APPEAL from an order of the Superior Court of Los Angeles County, Steven E. Ipson, Judge Pro Tempore. Affirmed.

Serobian Law and Liana Serobian, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

INTRODUCTION

In August 2018, the juvenile court took jurisdiction over five-year-old Ethan G. (born November 2012), finding the drug use of his mother (appellant Carley C.) endangered him. In April 2019, the court awarded joint legal custody of Ethan to Mother and the minor's father, Wayne G., but sole physical custody to Father, granting Mother monitored visits. The court also ordered the parties to devise a visitation schedule with the help of a mediator, and to submit a Juvenile Custody Order to the court, after which jurisdiction would be terminated. Mother immediately appealed, contending the court erred by: (a) terminating jurisdiction in light of Father's behavior; and (b) granting Mother visitation without specifying the duration and frequency of such visits. We find the court did not err in terminating jurisdiction, as the evidence did not compel a finding that conditions justifying jurisdiction still existed. We further find Mother forfeited her challenge regarding visitation by failing to object; in any case, it was not improper for the court to order the parties to work out a visitation schedule to be submitted to the court for approval. We affirm.

STATEMENT OF RELEVANT FACTS

A. *The Petition*

This family came to the attention of the Department of Children and Family Services (DCFS) in November 2017,

when DCFS received a report that "gang bangers" were allegedly "coming in and out of the home" where Ethan was living, and that Mother's boyfriend had a gun that Ethan saw. After some initial investigation, DCFS failed to substantiate the allegations, but discovered Mother was a substance abuser.

In March 2018, DCFS filed a petition under Welfare and Institutions Code section 300, subdivision (b)(1) (Section 300(b)(1)), which it amended one day later. As amended, the petition contained a single count alleging Ethan was endangered both by Mother's history of substance abuse and by Father's knowledge of and inaction regarding Mother's substance abuse.[1] When the petition was filed, Ethan lived with Mother at the maternal grandparents' house. The court released Ethan to Mother on the condition that she submit to drug tests and test clean. However, a few days after the petition was filed, Mother tested positive for methamphetamines and marijuana, then failed to appear for several subsequent tests. After Mother agreed to enter a drug rehabilitation program, DCFS agreed to postpone a request to remove Ethan from her custody.

In April 2018, Father (who lived in Arizona) met with the Children's Social Worker (CSW) assigned to the case and informed her that he was now present in California and would like Ethan to be placed with him in the event he could not be placed with Mother or the maternal grandparents.

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[1] Father was later removed as an offending party.

Father stated he would be willing to submit to drug testing, and that he used only marijuana.

B. *Ethan Is Removed from Mother and Placed with Father*

In May 2018, after Mother withdrew from her rehabilitation program, the juvenile court modified its previous order releasing Ethan to Mother, and instead placed Ethan with Father, granting Mother monitored visits.

In a June 2018 meeting with DCFS, Ethan appeared healthy and happy. Father mentioned that Ethan had an appointment for his annual physical examination on June 13, and he was waiting on a medical card to take Ethan to the dentist. However, in several subsequent interactions with DCFS, Father was brusque and aggressive.

In August 2018, Mother pled "no contest" to the sole count of an amended petition alleging: "The child, Ethan G[.]'s mother, Carley C[.], has a history of substance abuse and is a recent abuser of methamphetamine which renders the mother incapable of providing regular care and supervision of the child. On 12/11/17, the mother had a positive toxicology screen for amphetamine, methamphetamine and cannabinoids. The child is of such tender age as to require constant supervision. The mother's substance abuse places the child at risk of harm." At a subsequent disposition hearing, the court released Ethan to Father and allowed the pair to go to Arizona. However, the court stayed that order to permit an assessment of where

Ethan would be staying in Arizona. The court also ordered DCFS to request an expedited placement of Ethan in Arizona under the Interstate Compact on the Placement of Children (ICPC), and to assist Mother with visiting Ethan in Arizona.

During this time, Father continued to behave rudely and aggressively toward DCFS personnel. Additionally, in a court-mandated drug test in September, Father tested positive for cannabinoids. Nevertheless, in October 2018, the court lifted the stay on the order allowing Father to take Ethan to Arizona.

C. *Ethan in Arizona*

In the six-month status review report, DCFS noted Ethan appeared to be doing well with Father in Arizona. He attended school, had friends, and presented as "an active and playful child who is not shy around strangers or new people." Father had cooperated in making Ethan available for interview and inspection, as well as arranging Skype and phone visits with Mother. However, DCFS noted the ICPC home assessment of Father's home was not completed due to Father's failure to fill out certain forms. Further, the Arizona entity conducting the ICPC assessment had expressed concerns regarding Father's ability to care for Ethan. DCFS also noted neither Father nor Mother had completed individual counseling or parenting classes as ordered. The report additionally noted Father was subject to drug testing on demand by DCFS if it suspected Father was

using drugs, but DCFS had not asked Father to test since he moved to Arizona.

At the six-month review hearing in March 2019, the court set a contested hearing for April 29, 2019, because Father was requesting the court terminate jurisdiction. Father's interaction with DCFS remained strained, but when the CSW visited Ethan at his Arizona home, Ethan seemed well, and Father told the CSW he had found "an agency where he [Father] will be attending his programs." Father also showed the CSW a health insurance card for Ethan, and promised to schedule both a doctor's and dentist's appointment for Ethan as soon as possible. The CSW subsequently received a text showing a doctor's appointment for Ethan scheduled for April 22.

D. *The Court Terminates Jurisdiction*

On April 29, 2019, the court simultaneously held a hearing under Welfare and Institutions Code section 364 (Section 364) whether to terminate jurisdiction, and a hearing on Mother's request for a restraining order against Father.[2] DCFS's counsel asked the court to continue family maintenance services. Father's counsel asked the court to terminate jurisdiction, arguing DCFS had failed to provide any family maintenance services and Father was adequately caring for Ethan. Counsel also requested the court award Father sole legal and physical custody, with visitation

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[2] The application for a restraining order is not in the record.

provided for Mother. Mother's counsel argued the court should maintain jurisdiction because: (1) Mother had not been in compliance with the case plan; and (2) there had been a referral alleging drug use had been occurring at Father's house (though the social worker who investigated the referral saw no cause for concern); she asked for joint custody if the court were to terminate jurisdiction. Ethan's counsel requested the court terminate jurisdiction, place Ethan with Father, and give Father sole legal and physical custody. DCFS's counsel renewed his request that the court retain jurisdiction, noting that Father had made a doctor's appointment for Ethan the prior week, but that DCFS had no confirmation Father had taken Ethan to the appointment.

The court found insufficient evidence to maintain jurisdiction and terminated it. It awarded sole physical custody to Father, but gave both parents joint legal custody, granting Mother monitored visitation. The court ordered the matter submitted to mediation on May 21, 2019, presumably to devise a visitation schedule for Mother.[3] The court also ordered the parties to submit a Juvenile Custody Order by May 24, 2019, and stayed its order terminating jurisdiction pending receipt of that order. The court denied Mother's request for a restraining order. Mother voiced no objection

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[3] Neither the written order nor the reporter's transcript gives the court's reason for ordering mediation, but Ethan's counsel had previously requested mediation for the parents to work out a detailed visitation schedule.

that the court had not specified the frequency and duration of her visits. She appealed the next day.[4]

E. *Post-Appeal Matters*

In September 2019, Mother filed her opening brief. Two months later, DCFS submitted a letter, informing us it would not file a respondent's brief, and took no position on the issues Mother had raised. Included with this letter were three pleadings filed with the juvenile court after Mother's appeal was filed: (1) a mediation agreement signed by Mother and Father (filed May 21, 2019) reflecting the parents' agreement regarding custody and mother's visitation rights, including frequency and duration of such visits; (2) the Juvenile Custody Order (filed May 24, 2019) stating visitation was to occur as set forth in the signed mediation agreement; and (3) a May 24, 2019 minute order. The minute order stated: "Juvenile Custody Order is received, signed and filed this date. Stay is lifted and jurisdiction is terminated. [¶] Jurisdiction is Terminated for

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[4] The notice of appeal states Mother is appealing "termination of jurisdiction with family law order," "terms of family law order, specifically sole physical custody to father and monitored visits for mother," and "denial of mother's restraining order against the father." In her appellate brief, Mother makes no arguments about sole physical custody being granted to Father, nor the denial of her request for a restraining order. We thus deem those issues forfeited. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125 ["an appellant's failure to discuss an issue in its opening brief forfeits the issue on appeal"].)

Minor. Minor has been released to father. [¶] The Court finds that those conditions which would justify the initial assumption of jurisdiction under WIC section 300 no longer exist and are not likely to exist if supervision is withdrawn and the Court terminates jurisdiction. Jurisdiction is terminated this date. 05/24/2019." Mother did not file a reply to DCFS's letter.

DISCUSSION

A. *The Court Did Not Err in Terminating Jurisdiction*

1. Governing Principle

"After hearing any evidence presented by the social worker, the parent, the guardian, or the child, the court shall determine whether continued supervision is necessary. The court shall terminate its jurisdiction unless the social worker or his or her department establishes by a preponderance of evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn." (Welf. & Inst. Code, § 364, subd. (c) (Section 364(c)).)

Courts have disagreed over the meaning of "conditions still exist which would justify initial assumption of jurisdiction." Our colleagues in Division Five interpreted the phrase to mean the court should retain jurisdiction if *any* conditions existed that would justify the initial assumption

of jurisdiction, even if the existing conditions were not those that caused the court to assume jurisdiction initially. (*In re J.F.* (2014) 228 DCal.App.4th 202, 210 ["The language of section 364 does not literally require that the precise conditions for assuming jurisdiction under section 300 in the first place still exist—rather that conditions exist that '*would* justify initial assumption of jurisdiction.' (Italics added.)"].) In contrast, our colleagues in Division Eight have interpreted the phrase to mean the court should terminate jurisdiction if the initial conditions no longer exist. (*In re Janee W.* (2006) 140 Cal.App.4th 1444, 1451 [when deciding to terminate jurisdiction under section 364, court must determine "whether the conditions that justified taking jurisdiction in the first place still exist"]; see also *In re D.B.* (2015) 239 Cal.App.4th 1073, 1085 ["the better interpretation of section 364(c) is that the court must terminate jurisdiction if the conditions that justified taking jurisdiction in the first place no longer exist"].) We need not resolve this debate, however, as we find no error in the court's termination of jurisdiction under either interpretation.

2. Standard of Review

While "[o]rders made pursuant to section 364 are reviewed for substantial evidence" (*In re J.F.*, *supra*, 228 Cal.App.4th at 209), as our Supreme Court has explained: "where, as here, the trier of fact has found that the party with the burden of proof did not carry that burden, 'it is

misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. This follows because such a characterization is conceptually one that allows an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier of fact's unassailable conclusion that the party with the burden did not prove one or more elements of the case [citations]. [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." [Citation.]'" (*In re R.V.* (2015) 61 Cal.4th 181, 217-218.)

Here, the statute expressly specifies the court is to terminate jurisdiction "unless the social worker or his or her department establishes by a preponderance of evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn." (Welf. & Inst. Code, § 364, subd. (c).) "Thus, when the social services agency opposes termination of dependency jurisdiction, it clearly bears the burden of proof to show the existence of the conditions section 364(c) specifies must be proven to support retention of dependency jurisdiction." (*In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1146.) Because

the court found insufficient evidence to maintain jurisdiction, we determine whether the evidence presented to the contrary was uncontradicted and unimpeached, and of such a character and weight as to leave no room for a judicial determination that it was insufficient. (*In re R.V.*, *supra*, 61 Cal.4th at 218.)

3. Analysis

The conditions initially justifying jurisdiction self-evidently did not exist when the court terminated jurisdiction in April 2019. The only count in the sustained petition alleged Ethan was endangered because Mother's substance abuse rendered her incapable of providing regular care for Ethan. After Ethan was placed with Father, Ethan was no longer in danger of not receiving regular care due to Mother's substance abuse.

Additionally, no new conditions existed that would have justified the court's assuming jurisdiction over Ethan. While Mother notes Father had not yet taken Ethan to the doctor or dentist for an annual checkup, the evidence in the record shows Father took Ethan to the doctor in June 2018 and had an appointment to take him to the doctor in April 2019. He had also promised to schedule a dentist appointment as soon as possible. Mother complained Father had yet to complete individual counseling and parenting classes as ordered, but Father had informed DCFS in April 2019 that he had found "an agency where he will be attending his programs." Moreover, there was no indication

Ethan was suffering from Father's lack of attendance -- every observation of Ethan's well-being after being placed in Father's care acknowledged he was a happy child with no signs of abuse. While Father had tested positive for marijuana in September 2018 -- seven months before jurisdiction was terminated -- DCFS was authorized to order Father to drug test if it was concerned about Father's drug use, and it had not done so since Father's return to Arizona.

Finally, while Father's home had not been approved through the ICPC process, as Mother recognizes on appeal, the juvenile court did not need such approval to place Ethan with Father. (*In re C.B.* (2010) 188 Cal.App.4th 1024, 1036 ["an out-of-state placement with a parent is *never* subject to the ICPC"]; *In re John M.* (2006) 141 Cal.App.4th 1564, 1576 ["compliance with the ICPC is not required for placement with an out-of-state parent"].)

The record demonstrates Father behaved rudely and abrasively toward DCFS personnel. But while we do not condone such behavior, Father's incivility, coupled with the issues discussed above, do not compel a finding that conditions existed justifying jurisdiction. Mother has therefore failed to demonstrate the court erred by terminating jurisdiction.

B. *Visitation*

At the end of the April 29 hearing, the juvenile court ordered jurisdiction terminated, awarding legal custody of Ethan to both parents, but physical custody only to Father,

with monitored visits for Mother. The court did not specify the frequency or duration of Mother's visits, but ordered the parties to mediation on May 21, 2019, presumably to work out a visitation schedule. The court also ordered the parties to prepare a Juvenile Custody Order by May 24, 2019, and stayed the order terminating jurisdiction pending receipt of that order. Mother argues that ordering the parties to devise a visitation schedule at mediation "is an improper delegation of the court's authority to private parties."

Mother forfeited this argument by failing to raise it below. (See, e.g., *In re E.A.* (2012) 209 Cal.App.4th 787, 791 [father forfeited argument regarding visitation order by failing to effectively object during dispositional hearing]; *In re Rebecca S.* (2010) 181 Cal.App.4th 1310, 1313 ["'[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]'"].)

In any case, we discern no error. The parties were ordered to prepare a visitation schedule with the help of a mediator, and to then submit a Juvenile Custody Order to the court. A Juvenile Custody Order typically contains information about the frequency and duration of visits. Additionally, the court stayed termination of jurisdiction pending receipt of this order, presumably so it could review it. Nothing in the record suggests the court was doing anything but ordering the parties to agree upon and present

a visitation plan for the court's approval, after which it would terminate jurisdiction.[5] Mother presents no authority holding such action improper.[6]

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[5] We note that the pleadings submitted by DCFS appear to indicate that this is exactly what happened.

[6] The bulk of Mother's authority addresses situations in which the court gave third parties sole power to decide whether visits would occur. (*In re T.H.* (2010) 190 Cal.App.4th 1119, 1124 [court abused discretion by "framing its [exit] order in a way that gave mother an effective veto power" over father's right to visitation]; *In re Julie M.* (1999) 69 Cal.App.4th 41, 48-51 [court abused discretion by giving children "absolute discretion" on whether Mother's visits occurred]; *In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1138 [court abused discretion by giving children's therapist power to decide when visits would start occurring]; *In re S.H.* (2003) 111 Cal.App.4th 310 [child's wishes cannot be sole factor regarding whether visits occur]; *In re Donnovan J.* (1997) 58 Cal.App.4th 1474, 1476, 1477-1478 [giving private therapist "unlimited discretion to decide whether visitation is appropriate" was improper delegation of judicial power]; *In re Korbin Z.* (2016) 3 Cal.App.5th 511, 516-517 [error to give child sole discretion as to visitation].) One other case holds that an oral pronouncement of judgment controls over an inconsistent minute order. (*In re A.C.* (2011) 197 Cal.App.4th 796, 799-800.) None of these cases are relevant because the court did not give a third party power to decide whether visits would occur, and there was no conflict between the court's oral pronouncement of its order and the subsequent minute order.

DISPOSITION

The juvenile court's April 29, 2019 order is affirmed.

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MANELLA, P. J.

We concur:

COLLINS, J.

CURREY, J.